

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

TYRECE DEMONT MASON,)
Petitioner,)
v.) **1:12CV1154**
RUDY FOSTER,)
Respondent.)

ORDER AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner, a prisoner of the State of North Carolina, has submitted a petition under 28 U.S.C. § 2254 for writ of habeas corpus by a person in state custody, together with the applicable \$5.00 filing fee. For the following reason, the Petition cannot be further processed.

1. Petitioner indicates that he did not exhaust his state court remedies, as required by 28 U.S.C. 2254(b), by taking his direct appeal to the North Carolina Supreme Court or filing for collateral relief in the state courts. (Docket Entry 1, §§ 11(e), 12(d)(7).) Petitioner indicates that his attorney told him that he did not believe that the North Carolina Supreme Court would hear his case. Even if this is so, it does not excuse the exhaustion requirement of § 2254(b). Petitioner must exhaust his state court remedies before this Court can consider granting habeas relief.

Because of this pleading failure, the Petition should be filed and then dismissed, without prejudice to Petitioner filing a new petition on the proper habeas corpus forms with the \$5.00 filing fee, or a completed application to proceed *in forma pauperis*, and otherwise

correcting the defects noted. The Court has no authority to toll the statute of limitation, therefore it continues to run, and Petitioner must act quickly if he wishes to pursue this petition. See Spencer v. Sutton, 239 F.3d 626 (4th Cir. 2001). To further aid Petitioner, the Clerk is instructed to return Petitioner's \$5.00 filing fee and to send Petitioner a new application to proceed *in forma pauperis*, new § 2254 forms, and instructions for filing a § 2254 petition, which Petitioner should follow.

In forma pauperis status will be granted for the sole purpose of entering this Order and Recommendation.

IT IS THEREFORE ORDERED that *in forma pauperis* status is granted for the sole purpose of entering this Order and Recommendation. The Clerk is instructed return Petitioner's \$5.00 filing fee and to send Petitioner § 2254 forms, instructions, and a current application to proceed *in forma pauperis*.

IT IS RECOMMENDED that this action be filed, but then dismissed *sua sponte* without prejudice to Petitioner filing a new petition which corrects the defects of the current Petition once he has exhausted his state court remedies.

/s/ L. Patrick Auld
L. Patrick Auld
United States Magistrate Judge

Date: November 5, 2012